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Supreme Court, U.S.
FILED

DOCKET No. 04 94 JUL 1 3 2004

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER 2004

IN THE MATTER OF
ALLAN RAY McFARLAND
PETITIONER

V

UNITED STATES OF AMERICA
RESPONDENT

ON A PETITION
FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Allan Ray McFarland
Federal Medical Center
40015-080 Dallas Unit
PO BOX 15330
Fort Worth, Texas 76119

QUESTIONS PRESENTED

The First Question: Is the Fifth Circuit's decision denying McFarland's appeal contrary to clearly established substantive law as determined by the Supreme Court regarding the Factual basis and Elements that must be proved?

The Second Question: Is the Fifth Circuit's decision that McFarland's guilty plea obviated the need of proof beyond a reasonable doubt on the statutory substantive elements contrary to clearly established law as determined by the Supreme Court?

The Third Question: Do the many different interpretations of the Circuit Courts on what a Factual Basis is and how to properly conform to Federal Rules of Criminal Procedures, Rule 11 (f) require this Court to exercise its Supervisory Power?

LIST OF PARTIES

Rule 14.1 Statement

The parties of this proceeding are:

Allan Ray McFarland

United States of America

United States District Judge Walter Smith Jr.

TABLE OF CONTENTS

Page

Questions presented..... i

Rule 14.1 Statement..... ii

Table of Contents.....iii

Table of Authorities.....iv

Constitution, Statutes & Rules.....v

Opinions Below.....1

Jurisdiction.....1

Constitution and Statutory Provisions Involved 2

Statement of the Case.....3

Reasons for Granting the Writ.....6

Conclusion 11

TABLE OF AUTHORITIES

Page

Clicque v U S 514 F2d 923,928 n.5 (5th Cir 1975) 6

U. S. v Wilson 81 F3d 1300, 1307 (4th Cir 1996).....7

In re Ellis 356 F3d 1198, 1205 (9th Cir 2004).....7

U. S. v Camacho 233 F3d 1308 (11th Cir 2000).....7

U. S. v Smith 160 F3d 11, 121 (2nd Cir 1998).....8

U. S. v Harris 209 F3d 156, 161 (2nd Cir 2000).....8

U S v Allen 804 F3d 244, 245 (3rd Cir 1986).....8

U.S. v Bennett 291 F3d 888 (6th Cir 2002)..... 8

U.S. v Rose 357 F3d 615, 625 (6th Cir 2004) 9

U.S. v Ventura-Cruel 356 F3d 55, 60 (1st Cir 2003).....9

U.S. v Cafaratti 221 F3d 502 (3rd Cir 2000) 9

United States v Dayton 604 F2d 931 (5th Cir1979).....10

U S v Allen 804 F2d 244, 245 (3rd Cir 1986).....10

McCarthy v U S 394 U. S 459,464(1969).....10

CONSTITUTION, STATUTES & RULES

Page

21 U.S.C. 841 (a)(1).....3,4

21 U.S.C. 843 (b).....3

21 U.S.C. 846.....3

28 U.S.C. 1254 (1).....1

Supreme Court Rule 29.4.....1

Federal Rules of Criminal Procedures 11 (f)&b (3)....2,5

5th Amendment of the U.S. Constitution.....2,5,6

14th Amendment of the U.S. Constitution.....2

Opinions Below

The Fifth Circuit Court of Appeals Denial of Rehearing en-banc is (Appendix-1).

The Fifth Circuit Panel Decision is (Appendix-2).

The District Court's Order for the Western District of Texas is (Appendix-3).

McFarland's Notice of Appeal is (Appendix-4)

JURISDICTION

The decision sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on February 18, 2004. (Appendix-2). A rehearing en-banc was denied on April 15, 2004. (Appendix-1) This Court has jurisdiction to review that decision pursuant to 28U.S.C. 1254 (1).

Rule 29.4 (a) Statement

The United States of America is a party and the Solicitor General of the United States has been served at the Department of Justice 950 Pennsylvania Avenue NW Room 5614 Washington, D.C. 20530-0001.

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedures 11 (f) and b(3).

Fourteenth Amendment of the United States Constitution

Due Process Clause of the Fifth Amendment

The relevant portions of the Federal Rules of Criminal Procedures 11 (f) and b(3) is (Appendix-5).

The Fourteenth Amendment is (Appendix-6).

The Due process Clause of the Fifth Amendment of the United States Constitution is (Appendix-7).

STATEMENT OF THE CASE

On February 10, 1988, McFarland was named in three (3) counts of a five (5) count indictment charging him with Count 2, conspiracy to manufacture methamphetamine and to possession with intent to distribute methamphetamine 21 U.S.C. 841 (a) (1) and 21 U.S.C. 846, Count 4, distribution of methamphetamine 21 U.S.C. 841 (a) (1), and Count 5, use of a communication facility to facilitate a felony 841 (a) (1) and 843 (b).

On March 8, 1988, a five-count Superceding Indictment was issued charging McFarland with the same crimes and counts.

On May 21, 1988 McFarland entered into a Plea Bargain with the government whereby he agreed to plead guilty to the counts charged in the Superceding Indictment.

The Factual Basis and elements of this plea were that from November 1987 to January 22, 1988 McFarland conspired, with persons known and unknown to the Grand Jury, to manufacture methamphetamine and to possession with intent to distribute methamphetamine 21 U.S.C. 841 (a) (1) and 846.

And that on November 9, 1987 McFarland distributed methamphetamine, on November 11, 1987

McFarland used a communication facility to distribute methamphetamine; during the fall of 1987 McFarland made his rent house available to his co-conspirators to manufacture methamphetamine and aided in the production of approximately one pound of methamphetamine. McFarland also distributed approximately one(1) ounce of methamphetamine on November 9, 1987 at 5500 Franklin Waco, Texas by using a communication device on November 11, 1987.

On October 14, 1988 the Court rejected the Factual Basis of the plea agreement and McFarland withdrew his plea of guilty.

On December 5, 1988 the United States Attorney issued an Information charging McFarland with possession of methamphetamine with the intent to distribute on July 15, 1987 in violation of 21 U.S.C. 841 (a) (1). On the same date McFarland signed a plea agreement consenting to plead guilty to the one (1) count information. The Factual Basis, as stated in open Court by the government (Appendix-8), "... your Honor, but would specifically show that on or about the date alleged, Defendant McFarland received a quantity of methamphetamine, which had been manufactured by Roy Wells Jr., Patricia Shaw and others in July 1987. The methamphetamine was manufactured on this occasion by Shaw, Wells and others. A house owned by McFarland in Gholson, Texas is also referred to as the "McFarland rent house" in Gholson. Defendant McFarland possessed the methamphetamine with

specific intent to distribute it, your Honor." Factual Basis is (Appendix-11).

On February 6, 1989 McFarland was sentenced to fifteen years old parole law. During the sentencing, the government stated, "we stand on the Factual basis, which this Defendant agreed was a true and accurate factual basis..."(Appendix-9). McFarland was released on parole January 1993 and released from parole in February of 1998.

On July 3, 2003, McFarland filed a Writ of Error Coram Nobis in the United States District Court, Western District of Texas challenging the failure of a Factual Basis pursuant to Federal Rules of Criminal procedure 11(f) and (b) (3) and violation of his Constitutional rights under the Fifth Amendment Due Process Clause and it was contrary to clearly established substantive law as determined by the Supreme Court (Appendix-10). The District Court entered its Order August 5, 2003 without a response from the government (Appendix-3).

On August 12, 2003, McFarland filed his Notice of Appeal (Appendix-4).

On February 18, 2004 the Fifth Circuit Panel issued its per curiam decision affirming the District Court's decision (Appendix- 2).

On March 2, 2004, McFarland filed his Motion

for Rehearing en-banc with the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit Court of Appeals issued it's denial of McFarland's en-banc petition on April 15, 2004 (Appendix-1).

The Fifth Circuit's interpretation of a Factual Basis is in Direct Conflict with that of the Second, Third, Fourth, Sixth, Ninth and Eleventh Circuits. This case therefore presents this Court with the occasion to resolve a conflict between the circuits. In addition, since the Fifth Circuit affirmed the District Court's Order, (Appendix-2), it apparently approved the District Court's failure to accord the petitioner his Due Process Rights under the Fifth Amendment (Appendix-7). Granting the Writ will consequently provide the Court with the opportunity to emphasize the importance of this constitutional right.

REASON FOR GRANTING THE WRIT

The Fifth Circuit erred as a matter of law in stating that pursuant to Clicque [1] "McFarland's guilty plea obviated the need to have specific 'beyond a reasonable doubt' proof... on the statutory elements of the crime", rather than insuring that the District Court must find a Factual Basis for each element, satisfy itself that all the elements were committed, be presented with evidence, and make a decision based on detailed

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[1]Clicque v United States 514 F2d 923, 928 n-5 (5th Cir. 1975)

information. It substituted its own evaluation of the evidence for that of the Western District of Texas, contrary to this Court's pronouncement about the findings of a Factual Basis. If this were only a dispute of the Factual Basis, these errors might not merit review here, but when they resulted in an erroneous determination of a Factual Basis, substituted its own evaluation of the evidence and furthered the enormous split among the Circuits and District Courts.

This underlines the uncertainty about the binding effect of the judgment called into question. In addition, these errors make the conflict of the decisions of the Courts questionable, uncertainty as to the conflict of decisions of other United States Court of Appeals on the same important matter, which calls for this Court to exercise its Supervisory Power.

McFarland's Factual Basis (Appendix-11) failed to provide any detailed information [2] but was merely a Rote Recital of the information.

The District Court's Order (Appendix-3) states "It does not state what evidence would be used to prove these facts..." which conflict with the Eleventh Circuit's Factual Basis Findings of " must determine whether the District Court was presented with evidence from which

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[2]U.S. v Wilson 81 F3d 1300,1307 (4th Cir 1996)
In re Ellis 356 F3d 1198, 1205 (9th Cir 2004)

it could reasonably find the Defendant was guilty". [3] The District Court's failure to match the facts to the legal elements conflicts with the Second Circuit. [4] The legal elements are:

1. Knowingly

2. Possessed methamphetamines

3. With intent to distribute

At the Plea Hearing (Appendix-8, page 7) the District Court states, "what in summary would the government's evidence be as to this matter?"

The government then repeats word for word the Factual basis (Appendix-11). For there to be a Legal element of intent to distribute there must be a drug amount, more than "a quantity". "A quantity" could be for personal use. The District Court did not descend to the specifics of the crime, and McFarland did not admit to the substantive element as to intent to distribute, this conflicts with the Third Circuit's Factual basis. [5]

The prosecutor's statement "rote recital of the information and factual basis" conflicts with Sixth Circuit Opinions, that a bare statement from the

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[3]U.S. v Camacho 233 F3d 1308 (11th Cir 2000)

[4]U.S. v Smith 160 F3d 117,121 (2nd Cir 1998)
U.S. v Harris 209 F3d 156, 161 (2nd Cir 2000)

[5]United States v Allen 804 F2d 244,245 (3d Cir 1986)

prosecutor is not sufficient, [6] and it must ask the Defendant to state in his own words his knowledge and intent. Bennett @890.

McFarland's Plea Hearing (Appendix-8 page 7) after the reading by the prosecutor of the information (Appendix-12) , the Court asks, "Is that what you're pleading guilty to?" and then after reading the Factual Basis it asked, "Mr. McFarland, do you agree with the prosecutor's summary of what you did?" which conflicts with the Sixth Circuit's opinion which states that merely asking about the Factual Basis being true is not enough.[7]

The proceedings, plea hearing and sentencing conflict with the First Circuit's Factual Basis of the Factual Predicate Must Exist, [8] and conflicts with the Third Circuit's law of spelling out the basis for the finding.[9]

The District Court order, Final Statement (Appendix-3) states that the Factual Basis does state that the government would be able to prove each of the elements of the crime to which he pled guilty beyond a reasonable doubt. Again, that is all that is required,

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[6]U.S. v Bennett 291 F3d 888 (6th Cir 2002)

[7]U.S. v Rose 357 F3d 615, 625 (6th Cir 2004)

[8] U.S. v Ventura-Cruel 356 F3d 55,60 (1st Cir 2003)

[9]U.S. v Cafaratti 221 F3d 502 (3rd Cir 2000)

conflicts with Third and Fifth Circuit law which (is) requires subjective satisfaction is the test to be used by the trial judge... a mere ritual does not suffice. [10]

Between 1989 and 2003, the District Court made drastic changes in their Factual Basis (Appendix-13). The Fifth Circuit has now in 2004 accepted the sound teaching that a Factual Basis must descend to the specifics. But in this case, there is not the slightest indication the Fifth Circuit reviewed the decision of the District Court in any fashion other than abuse of discretion, nor is there any indication that either the District Court or the Court of Appeals felt bound to their current drastic changes.

This Court's subnote -6 in McCarthy [11] citing the Advisory Committee suggests three methods of determining that a Factual Basis exists for a guilty plea and making no further findings of a Factual Basis opened the door to the conflicts in the Circuits, which is an important Federal Question of Due Process which should be settled by this Court.

A review of the Factual Basis (Appendix-11), Information (Appendix-12), Plea Hearing Transcript (Appendix-8), and McFarland's P.S.I. (Appendix-14),

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[10]United States v Dayton 604 F2d 931 (5th Cir 1979)
United States v Allen 804 F2d 244,245 (3rd Cir 1986)

[11]McCarthy v United States 394 US 459,464 (1969)

finds the same rote recital without any specifics that the District Court could have satisfied itself of any Factual Basis. However, if the government had produced a Factual Basis such as (Appendix-13) in McFarland's case, he would not be before this Court today.

CONCLUSION

The Grant of Certiorari is therefore warranted so this Court can define in specific terms Due Process of a Factual Basis. If fair procedures are required, no matter who is being punished or what power is invoked, the Fifth Circuit wrongly endorsed the Trial Court's semantic dodge in this case. The conflicts among the Circuits requires the Court to exercise it's Supervisory Power even though there is support in reason and precedent for all of them, and absent guidance or other courts may include they too can escape the reach of Due Process simply by invoking some abstract statement. To leave McCarthy in limbo after all these years of interpretive conflicts is no way to treat Due Process Rights.

Allan Ray McFarland

APPENDIX TABLE OF CONTENTS

1. Fifth Circuit's denial or rehearing en-banc
2. Fifth Circuit's Panel Decision
3. District Court's Order
4. Notice of Appeal
5. Federal Rules of criminal Procedures 11 (f) b(3)
6. Fourteenth Amendment
7. Fifth Amendment
8. Plea Hearing transcript
9. Sentencing transcript
10. Writ of Error Coram Nobis
11. Factual basis
12. Information
13. Taylor's Factual Basis
14. McFarland's P.S.I

APPENDIX - 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 03-51014

ALLAN RAY MCFARLAND
Petitioner- Appellant

versus

UNITED STATES OF AMERICA
Respondent-Appellee

U.S. COURT OF APPEALS
FILED
APR 15 2004
CHARLES R. FULBRUGE III
CLERK

Appeal from the United States District Court
for the Western District of Texas
USDC No-W-03-CV-269

ON PETITION FOR REHEARING EN BANC
Before HIGGINBOTHAM, EMILIO M. GARZA and Prado Circuit Judges

(✔) Treating the petition for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (FRAP and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this court having been polled at the request of one of the judges and a majority of the judges not having voted in favor of it (FRAP and 5th Cir. R. 35). The petition for rehearing En Banc is DENIED

ENTERED FOR THE COURT

"S/ Edward C. Prado "

UNITED STATES CIRCUIT JUDGE

CLERK'S NOTE:

SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

APPENDIX - 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 03-51014
Conference Calendar

ALLAN RAY MCFARLAND
Petitioner-Appellant

versus

UNITED STATES OF AMERICA
Respondent-Appellee

United States Court of Appeals
Fifth Circuit
FILED
February 18, 2004
Charles R. Fulbruge III
Clerk

Appeal from the United States District Court
for the Western District of Texas
USDC No. W-03-CV-269
Before HIGGINBOTHAM, EMILIO M. Garza. And
PRADO, Circuit Judges. PER CURIAM

Allan Ray McFarland was sentenced to 15 years of imprisonment in 1988 following his guilty -plea conviction for possession with intent to distribute methamphetamine. He discharged his sentence on that conviction and is currently incarcerated following a conviction for being a felon in possession of a firearm. McFarland filed a petition for a writ of error coram nobis challenging the validity of his 1988 guilty-plea conviction as being unsupported by a sufficient factual basis. The district court denied McFarland's petition, and McFarland now appeals.

McFarland contends that the factual basis offered in support of his guilty plea was insufficient because the Government did not prove each element of the offense beyond a reasonable doubt. We conclude that the factual basis was sufficient as it alleged facts supporting each element of the offense and it alleged that the Government could prove those facts beyond a reasonable doubt. See United States v Martinez-Mercado, 888F.2d 1484, 1491 (5th Cir. 1989) United States v Dayton 604 F.2d 931,943 (5th Cir. 1979). McFarland's guilty plea "obviate(d) the need to have specific 'beyond a reasonable doubt' proof on the ... statutory elements of the crime."See Clicque v United States 514 F.2d 923,928 n.5 (5th Cir. 1975).

McFarland has not shown that his 1988 conviction was invalid. Consequently, the district court's denial of his petition for a writ of error coram nobis is affirmed. United States v Morgan 346 U.S.

502, 506-13 (1954); United States v Marcello 876 F. 2d 1147,1154 (5th Cir 1989).

AFFIRMED.

Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

APPENDIX -3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

FILED
AUG 25 2003
CLERK, U.S. DISTRICT COURT
DEPUTY CLERK

ALAN RAY MCFARLAND,
Movant

AUG 29 2003
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

v

UNITED STATES OF AMERICA
Respondent

CRIMINAL NO. W-88-CR-010(7)

ORDER W03CA269

Allan Ray McFarland, Movant, brings this his Writ of Error Coram Nobis pursuant to the All Writs Act. He appears *pro se and in forma pauperis*. Movant attacks the sufficiency of the factual basis used to support his plea of guilty to a charge of possession with intent to distribute methamphetamine, in violation of 18 U.S.C. § 841 (a) (1). Movant has previously filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, which was denied. Movant has completed the sentence in question and is currently incarcerated in the Federal Medical Center in Fort Worth on other charges.

Movant argues that the factual basis set forth by the Government was insufficient to support his plea of guilty. Specificially, he argues that the drug's identity, amount, and his intent to distribute it were "not proved beyond a reasonable doubt." The factual basis does state, as Movant admits, that he possessed a quantity of methamphetamine with the specific intent to distribute it. It does not state what evidence would be used to

prove these facts, only that the Government would be able to do so. That is all that is required.

A factual basis need not contain any reference to specific evidence that would be used to convict the defendant where he to proceed to trial, but it must state that the Government would be able to prove all of the elements of the crime beyond a reasonable doubt. There is certainly not any requirement that the Government prove the elements in a factual basis beyond a reasonable doubt. That is one distinguishing characteristic between a guilty plea and a trial: during a guilt plea entered at a rearraignment, the Government must simply demonstrate that it would be able to prove the elements of the crime beyond a reasonable doubt and at trial the Government must actually prove each of the elements beyond a reasonable doubt. As described in his Writ of Error Coram Nobis, the factual basis does state that the Government would be able to prove each of the elements of the crime to which he plead guilty beyond a reasonable doubt. Again, that is all that is required.

Accordingly, it is

ORDERED that Movant's Writ of Error Coram Nobis is **DENIED**. It is further **Ordered** that this case is **DISMISSED**

SIGNED this 5th day of August 2003.

"S/ _____ "

WALTER S. SMITH, JR

Chief United States District Judge

APPENDIX - 4

Federal Medical Center
Allan Ray McFarland
40015-080 San Antonio Unit
P. O. Box 15330
Fort Worth, TX 76119

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

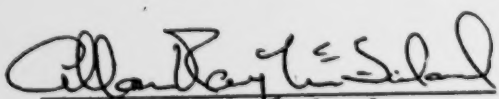
Allan Ray McFarland
Movant

V No. W-88-CR-010 (7)

United States Of America
Respondent

NOTICE OF APPEAL

Comes now, Allan Ray McFarland, and files his Notice of Appeal to the Fifth Circuit, from the District Judges' Order dated August 3, 2003, denying McFarland his Writ of Error Coram Nobis signed by Chief Judge Walter Smith, Jr. which was done without any response from the Government.

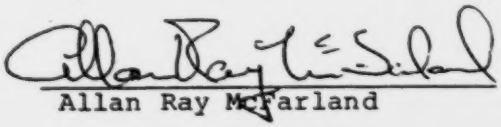


Allan Ray McFarland

CERTIFICATE OF SERVICE

I, Allan Ray McFarland, certify that on the 12th day of August, 2003, I placed in the inmate mail system, 1st class postage prepaid, a copy of the Notice of Appeal to:

United States Attorney
800 Franklin St.
Waco, TX 76701



Allan Ray McFarland

APPENDIX - 5

FEDERAL RULE OF CRIMINAL PROCEDURE
RULE 11(f) and 11(b)(3)

RULE 11 (f) DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basic for the plea.

RULE 11(b) (3) DETERMINING THE FACTUAL BASIS FOR A PLEA. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

APPENDIX - 6
U.S. CONSTITUTION: FOURTEENTH AMENDMENT

SECTION 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

APPENDIX - 7

AMENDMENT V- GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

HISTORICAL NOTES

Proposal and Ratification

The first ten amendments of the Constitution were proposed to the Legislatures of the several states by the First Congress on September 25, 1789, and were ratified on December 15, 1791. For the states which ratified these amendments, and the dates of ratification, see Historical Notes under Amendment 1.

AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

APPENDIX - 8

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA

CRIMINAL
ACTION NO W-
88-CR-10 (7)
December 5,1988
Waco, Texas

VS
Allan Ray McFarland

BEFORE THE HONORABLE WALTER S. SMITH, JR; JUDGE PRESIDING

REARRAIGNMENT PROCEEDINGS

APPEARANCES:

For the Government:

Mr. William A (Bill)Johnston
Assistant U.S. Attorney
P.O. Box 828
Waco, Texas 76703

For the Defendant:

Mr. W. V. Dunnam, Jr.
Dunnam & Dunnam
Attorneys at Law
4125 West Waco Drive
Waco Texas 76710

And

Mr. Charles W. McDonald
Attorney at Law
3306 West Waco Drive
Waco, Texas 76710

Court Reporter: Morris W. Bowen, CSR
Official Court Reporter
United States District Court
P.O. Box 1908
Waco, Texas 76703

Proceedings recorded by mechanical stenography, transcript produced by notereading.

December 5, 1988-rearraignment proceedings

COURTROOM DEPUTY: Rearraignment Proceedings in Criminal Action W-88-CR-10 (7) styled "United States of America vs Allan Ray McFarland."

MR JOHNSTON: Bill Johnston for the United States, Your Honor.

Mr. DUNNAM: Bill Dunnam and "Chuck" McDonald for the Defendant.

THE COURT: Good Afternoon, Counsel. Would you come to the lectern so we'll have the benefit of the microphone, please.

Mr. DUNNAM: Do you want the Defendant, too, Judge? Do you want the Defendant?

THE COURT: Yes, please.

This is Cause No. W-88-CR-10, styled U.S.A. vs Allan Ray McFarland.

Is that your name, sir?

THE DEFENDANT: Yes, sir.

THE COURT: How old are you, Mr. McFarland?

THE DEFENDANT: Forty-two.

THE COURT: And how much education have you received, sir?

THE DEFENDANT: Eleven years and a GED.

MR. DUNNAM: Talk a little louder.

THE COURT: Would you swear Mr. McFarland, please, Mrs. Flowers.

(Defendant sworn.)

THE COURT: Mr. McFarland, do you understand that if you enter a guilty plea I'm going to ask you some questions about the offense to which you're pleading, and that if you answer those questions in open court under oath and in the presence of counsel your answers can be used against you in a prosecution for perjury or false statement if they're not true?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Dunnam, do you have any doubt as to your client's competence to stand trial and enter a plea, at this time?

MR. DUNNAM: None.

THE COURT: Do you believe he has both a factual as well as a rational understanding-

MR. DUNNAM: Yes, Your Honor.

THE COURT: -of the proceedings against him?

MR. DUNNAM: Yes.

THE COURT: Mr. McFarland, do you suffer from any mental or physical impairment which would have any effect on your ability to fully understand the charges against you and the basis and consequences of a

guilty plea?

THE DEFENDANT: No, sir.

THE COURT: Have you ever had any injury that might effect you adversely in that matter?

THE DEFENDANT: No, sir.

THE COURT: Are you, at this time, under influence of any medications that might have an effect on you?

THE DEFENDANT: No, sir.

THE COURT: Have you received a copy of the Information naming you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you read it or had it read to you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed the charges in that Information with Mr. Dunnam and Mr. McDonald?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed with them any defenses that you might have to those charges?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the charges?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about them?

THE DEFENDANT: No, sir.

THE COURT: Do you understand that the maximum possible penalty under this Information is 20 years of imprisonment, a million dollar fine and a one-time mandatory assessment of $50?

THE DEFENDANT: Yes, sir.

THE COURT: Has there been a plea agreement

in this case, Mr. Johnston?

MR. JOHNSTON: There has, Your Honor.

THE COURT: What is it?

MR. JOHNSTON: Your Honor, in this case the Defendant has agreed to plead guilty to the one count Information on file against him charging him with Possession of methamphetamine With Intent to Distribute

He's had his constitutional and statutory rights fully explained to him by his attorney.

He understands those rights and he wants to plead guilty to the offense he committed. He understands and recognizes that he may receive as much as 20 years of imprisonment, a million dollar fine, $50 Special Assessment after his plea. And he understands that's the exposure and he has had no promises made to him or prophecy made to him concerning what his sentence may be. He may get up to 20 years, and he knows he's going in.

We agree at sentencing to dismiss the Superseding Indictment as to him only. And that is the entire agreement.

THE COURT: Is that the agreement, Mr. Dunnam?

MR. DUNNAM: Yes, Your Honor. Plus that he will not be prosecuted under any other thing of which the Government has notice as of now.

THE COURT: Is that also correct, Mr. Johnston?

MR. JOHNSTON: This is the extent of the prosecution against him, Your Honor.

THE COURT: All right.

Mr. McFarland, do you understand the agreement and do you approve of it?

THE DEFENDANT: Yes, sir.

You're charged by Information with Possession of Methamphetamine With Intent to Distribute, a violation of title 21, United States Code, Section 841 (a) (1).

Do you understand that you have the right to plead not guilty to that charge and to continue in that not guilty plea if you have already entered it?

THE DEFENDANT: Yes, sir.

THE COURT: Knowing that, to the charge of Possession of methamphetamine With Intent to Distribute, as alleged in the Information, how do you wish to plead, sir, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Would you read the Information, please, Mr. Johnston.

MR. JOHNSTON: Yes, Your Honor. This Information against Allan Ray McFarland reads:

"That on or about July 15, 1987, in the Western District of Texas, Defendant Allan Ray McFarland did knowingly, intentionally and unlawfully possess methamphetamine, a Schedule II Controlled Substance, with intent to distribute same, in violation of title 21, United States Code, Section 841 (a) (1)."

THE COURT: Is that what you did, Mr. McFarland?

THE DEFENDANT: Yes, sir.

THE COURT: Is that what you're pleading guilty to?

THE DEFENDANT: Yes, sir.

THE COURT: What in summary would the Government's evidence be as to this matter, Mr. Johnston?

MR. JOHNSTON: Your Honor, a detailed Factual basis is on file with the Court and it has been tendered to defense counsel and no objection to it has been ledged. We would prove each and every element of this Information beyond a reasonable doubt if we went to trial, Your Honor, but would specifically show that on or about the date alleged, Defendant McFarland received a quantity of methamphetamine, which had been manufactured by Roy Wells, Jr., Patricia Shaw and others in July of 1987. The methamphetamine was manufactured on this occasion by Shaw, Wells and others. A house owned by McFarland in Gholson, Texas, is also referred to as the McFarland rent house" in Gholson. Defendant McFarland possessed the methamphetamine with the specific intent to distribute it, Your Honor.

THE COURT: Mr. McFarland, do you agree with the Prosecutor's summary of what you did?

THE DEFENDANT: Yes, sir.

THE COURT: Before accepting your guilty plea there are a number of rights I wish to advise you of and a number of questions I want to ask you. If you don't understand these rights or questions, feel free to consult your attorneys at any time.

First, have you had an ample opportunity to discuss your case with your attorneys and are you satisfied with their representation?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that under the Constitution and the laws of the United States you're entitled to a trial by a jury on the charges contained in the Information?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that at such a trial and at every stage of the proceedings against you you have the right to be represented by counsel?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you're presumed to be innocent and that the Government is required to prove your guilt by competent evidence beyond a reasonable doubt before you can be found guilty and that you never have to prove that you're innocent?

THE DEFENDANT: Yes, sir.

THE COURT: Do you recognize that during a trial the witness for the Government would have to come into court and testify in your presence?

THE DEFENDANT: Yes, sir.

THE COURT: Your attorneys would then have the right to cross-examine them, to object to their evidence and to offer evidence on your behalf?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you would have the right to testify, but you would also have the right not to testify, and if you chose not to testify, the fact could not be used against you in anyway?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty and I accept

your plea, do you understand that you would waive these right I just explained to you, and that there will be no further trial, that I will enter a Judgment of Guilty and sentence you after considering your guilty plea and a Pre-Sentence Report?

THE DEFENDANT: Yes, sir.

THE COURT: The charge to which you're pleading guilty is a felony under federal law. That means that you have the right before any trial or plea to have the evidence against you presented by the U.S. Attorney's Office to a grand jury, which might or might not return an indictment? You may waive that right, if you wish to, and proceed in this case on the Information that's been filed. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you want to waive that right?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have a written waiver on file, Mrs. Flowers?

COURTROOM DEPUTY: Yes, sir, we do.

MR. JOHNSTON: Yes, Your Honor.

THE COURT: Having discussed your rights with you, do you still want to plead guilty, Mr. McFarland?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty because you are guilty and for no other reason?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone threatened you, forced

you or coerced you in anyway into pleading guilty?

THE DEFENDANT: No, sir.

THE COURT: Mr. Johnston, would I assume correctly that restitution would not be appropriate in this case?

MR. JOHNSTON: That's correct.

THE COURT: Then again, Mr. McFarland, do you understand that the maximum possible sentence for the offense to which you're pleading guilty could be as much as 20 years of imprisonment, a million dollars in fines and a one-time $50 mandatory assessment?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that the Court is not required to accept the plea agreement and could reject it?

THE DEFENDANT: Yes, sir.

THE COURT: If I did that you would be so advised at the time of sentencing and you would have the right to withdraw your guilty plea. Do you understand, though, that if you insisted on continuing to plead guilty, then the disposition of your case would be less favorable to you than the proposed in the plea agreement?

THE DEFENDANT: Yes, sir.

THE COURT: I'm sorry?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone made any prediction, prophecy, or promise to you as to what your sentence would be?

THE DEFENDANT: No, sir.

THE COURT: Do you want to continue in your guilty plea, or do you want to withdraw it?

THE DEFENDANT: Continue.

THE COURT: Then the Court finds that your plea is freely and voluntarily made; that you fully understand the charge and penalties; that you understand your constitutional rights and desire to waive them; that you are competent to stand trial; and that there is a Factual Basis for the plea..

This matter will now be referred to the Probation Office to prepare a Pre-Sentence Report, a copy of which will be available both to you, Mr. McFarland, and to your attorneys, to review prior to sentencing.

Based on these findings, I accept your guilty plea and find you guilty.

Mr. Reyna, has a Pre-Sentence Report already been prepared in this case previously?

PRE-TRIAL SERVICES OFFICER: Yes, Your Honor. I think this is one of the cases that you handled out of Austin.

THE COURT: Based on that, do you have any suggestions as to how long it would take to—

PRE-TRIAL SERVICES OFFICER: I would think it would be a very brief update, if anything. I'm not exactly sure as to what the facts will be, if they would be different from the previous one or not, Your Honor. That would be the biggest thing they would have to reconsider. I do not think that that would take very long at all.

THE COURT: Well, the sentencing will be tentatively set for January the 9th, 1989, a 1:00p.m. However, if the Pre-Sentence Report can be prepared before that, we will set it as quickly as we can, because I'm sure you're ready to get this matter over with, Mr.

McFarland. And I will urge the Probation Office in Austin to do it as quickly as they can.

MR. DUNNAM: Judge-

THE COURT: Yes, sir

MR.DUNNAM: - the Defendant would like to make a motion and I'd like to ask him a couple of questions about it before the Court adjourns.

THE COURT: All right, sir.

MR. DUNNAM: I move the Court to grant this man bail to the 9th, for the reason that he has been incarcerated in solitary confinement now going on 11 months. And I want to ask him a question and show the Court the reason why. And he has a child custody case going on here- not for him to get custody, he knows better than that- but for his mother to have custody, who has had them up until just recently. And his- between her and his former wife, who is - has a dope problem herself. Could I ask him a couple of questions?

THE COURT: Yes, sir.

ALLAN RAY McFARLAND, THE DEFENDANT
PREVIOUSLY SWORN DIRECT EXAMINATION
BY MR. DUNNAM:

Q Mr. McFarland, you've been incarcerated going on toward 11 months?

A Yes, sir.

Q And tell the Court why you have been in solitary confinement throughout all of this time.

A Because of food allergies I'm required to keep a syringe of adrenaline with me at all times to- in

case I go into anaphylactic shock.

Q And will it permit any prisoners to be in there and you in possession of a hypodermic needle and the adrenaline, in case you go into shock? Just do they permit the other prisoners–

A Oh, no, sir.

Q And have you, in fact, been in solitary confinement throughout you incarceration?

A Yes, sir.

MR. DUNNAM: Based on that, Your Honor, we'd ask the Court to grant this many bail. He hasn't had no bail, he's been here 11 months in solitary confinement, which is equivalent to actually punishment above and beyond an ordinary prisoner is placed on, unless it some form of administrative punishment.

THE COURT: What type of bail could be suggested, Mr. Dunnam?

MR. DUNNAM: Well, he and his brother put up everything his brother has or him. That's certain he is he's not going anywhere.

THE COURT: I haven't the foggiest thought in my head what that amounts to.

MR. DUNNAM: Well, I imagine it's about net – I couldn't guarantee this– but maybe 25 or 30,000.

THE COURT: All right.

MR. DUNNAM: I think his brother– they've got this building and they've got a debt against it.

Mr. JOHNSTON: Your Honor, if I may just state on the record the Government's position?

THE COURT: Sure.

MR. JOHNSTON: Your Honor, this Court may

remember from a review of the voluntary- review of the detention hearing that was held in Austin, Texas, the Government has maintained throughout that this Defendant is truly a danger to the community. He possesses some very dangerous tendencies. We put on evidence, both in front of Judge Green and before this Court in Austin of it, and we're very concerned, not of flight so much as the danger to the community. There may be a desire to retaliate and so forth, and we articulated some of that at the hearing. And if the Pre-Trial Services checks into it, we'd sure like an opportunity to give them definite information, Your Honor.

THE COURT: Well, I'm going to ask Mr. Reyna of Pre-Trial Services to make a recommendation to the Court, and ask him to do that by the end of this week, at the latest.

Thank you, Counsel.

MR. McDONALD: Thank you, Your Honor.

MR. JOHNSTON: Thank you, Your Honor.

(Hearing adjourned).

THE STATE OF TEXAS)
COUNTY OF McLENNAN)

I, Morris W. Bowen, Certified Shorthand Reporter in and for the State of Texas and former Official Court Reporter for the United States District Court, Western District of Texas, Waco Division,, do hereby certify that the foregoing pages 2 Through 16 constitute an accurate and complete transcript of my shorthand notes in the above entitled and numbered cause on the dates reflected therein, and that such transcript was prepared under my direction and supervision.

I certify that the transcript fees charged and page format used comply with the requirements of the United States Courts and the Judicial Conference of the United States.

TO CERTIFY WHICH, witness my signature set hereto in the City of Arp, County of Smith, State of Texas on this the 4th day of March A.D. 2004.

"S/ Morris W. Bowen"

Morris W. Bowen
14980 East Lake Circle
Arp, Texas 75750

APPENDIX -9

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA CRIMINAL ACTION NO
VS W-88-CR-10 (7)

Waco, Texas
February 6, 1989

ALLAN RAY MCFARLAND

SENTENCING

BEFORE THE HONORABLE WALTER S SMITH, JR.,
JUDGE

APPEARANCES:

For the Government:

Mr. William W. Johnston
Assistant U.S. Attorney
P. O. Box 828
Waco, Texas 76703

For the Defendant:

Mr. W. V. Dunnam, Jr.
Dunnam Dunnam,Horner Meyer
Attorneys at Law
4125 West Waco Drive
Waco, Texas 76710
and
Mr. Charles W. McDonald
Attorney at Law
2900 West Waco Drive
Waco, Texas 76707

Court Reporter: Morris W. Bowen
Official Court Reporter
United States District Court
315 U. S. Courthouse
Waco, Texas 76701

Proceedings recorded by mechanical stenography, transcript provided by notereading.

PROCEEDINGS HAD FEBRUARY 6, 1989

MS. FLOWERS: Sentencing proceedings in Criminal Action W-88-CR-10 (7), styled "United States of America vs.Allan Ray McFarland."

MR. JOHNSTON: Bill Johnston for the United States, Your Honor.

MR. DUNNAM: Bill Dunnam and "Chuck" McDonald for the Defendant, Your Honor.

THE COURT: Mr. McFarland, you appeared before the Court on December the 5th and your plea of guilty was accepted, you're now here for sentencing. Have you had an opportunity to review the pre-sentence report in this case?

THE DEFENDANT: Yes, sir.

THE COURT: And do you have any comments or corrections you wish to make concerning it?

THE DEFENDANT: Just what the attorney filed, Your Honor.

THE COURT: All right, Mr. Dunnam, you've also had an opportunity to review the report?

MR. DUNNAM: Yes.

THE COURT: And do you have any comments or corrections to make?

MR. DUNNAM: Just those that we've filed in writing.

THE COURT: Are there any of those which need a – require a ruling be made?

MR. DUNNAM: Yes. I think all of them do, Judge.

THE COURT: Okay, I'm not sure I have a copy in front of me. Does anybody have an extra copy?

MRS. Flowers: Tammy went to get one.

THE COURT: I am getting them from all sides.

Okay, Dunnam, I have something designated Defendant's – all right–"Motion to Strike and Exclude," is that what we're dealing with?

MR. DUNNAM: That's it, Judge.

THE COURT: Mr. Dunnam, how do you want to handle this? Do you want to make some argument concerning all or any of these–

MR. DUNNAM: No, Judge, they speak for themselves–

THE COURT: –suggestions? Well, –

MR. DUNNAM: –with the affidavits attached. The affidavits attached.

MR. MCDONALD: Here's a supplemental affidavit.

MR. DUNNAM: And the – and the prior United States Attorney's statement of what the facts were. And there was a supplemental affidavit filed, I don't know whether the Court's got it. I didn't know it until the other day.

THE COURT: Yes.

MR. DUNNAM: Where he swore to it before a notary.

MR. MCDONALD: Yeah.

(Court stood at ease momentarily)

THE COURT: Mr. Johnston, do you have any response to this Motion to Strike or objections to the report?

MR. JOHNSTON: Well, Your Honor, I don't know that the first Roman numeral paragraph really matters one way or another. I mean, in the law he was once charged with them and in the PSI, I think, refers to "other Defendants." I mean, I don't think that really matters.

THE COURT: I'm really not concerned about that paragraph, that'll be overruled or denied.

MR. JOHNSTON: Otherwise, Your Honor, we stand on the factual basis, which this Defendant agreed was a true and accurate factual basis, and i will remind the Court, simply stated, that this Defendant received methamphetamine from Patricia Shaw that was manufactured by Patricia Shaw-- by Patricia Shaw, Row Wells and others. That he received the methamphetamine and possessed it with the specific intent to distribute it. We just stand on that factual basis, it's sufficient for what we're here today on. I don't – the rest of this, Your Honor, I think is more an argument for leniency, and I won't respond to that.

THE COURT: Mr. Felty, do you have any comments to the objections to paragraph four and five?

MR. JOHNSTON: Just a moment, please, Your Honor.

(Court stood at ease momentarily.)

MR. FELTY: Your, Honor, I feel like paragraph four is pretty well covered by the pre-sentence outline, what took place, what the man's health situation is.

THE COURT: All right, sir.

The–

MR. FELTY: Let me look at five, Your Honor.

(Court stood at ease momentarily.)

MR. JOHNSTON: My position on that paragraph, Your Honor, is that it's not critical to sentencing. I mean, it – it– it bats back and forth what he may have owned and what documentation there may be. And we have no objection to the Court, you know, ruling in favor of the Defense on – on that paragraph, we don't think it's critical to sentencing, regarding his financial status.

THE COURT: I'll state into the record that that part of the report would have no effect on any sentence the Court might assess, in any event.

All right. Any additional objections at all, Counsel?

MR. DUNNAM: Oh, Judge, there' one thing that we caught that I didn't correct because I assumed the Court would catch it anyway. In the last one page argument on sentence, we – we correct it, but in this Application to Strike, in the one prior we had 17 percent received probation, 75 percent received an average of 57, and then we said eighty something received a split sentence. Of course, it was eight.

THE COURT: Mr. McFarland, do you have anything that you would like to tell the Court before sentence is imposed? If you care to, this is your opportunity to make any statement in your behalf or in

mitigation of punishment.

(Hushed conversation between the Defendant and Counsel for Defendant.)

THE DEFENDANT: No, sir. I think that everything's already been said.

THE COURT: All right. Mr. Dunnam, do you have any comment to make on behalf of your client?

MR. Dunnam: Well, Your Honor, I think we presented it in that one page.

THE COURT: Mr. McDonald?

Mr. McDonald: I don't think any further argument could do any more.

THE COURT: Mr. McFarland, do you know of any legal reason why sentence should not be imposed?

THE DEFENDANT: no, sir.

THE COURT: Mr. Dunnam, do you know of any such reason?

MR. DUNNAM: None, Judge.

THE COURT: Mr. Johnston, any comment to make on behalf of the Government?

MR. JOHNSTON: Nothing from the Government. Thank you.

THE COURT: All right. Mr. McFarland, you and your attorneys have done everything I know possible to try to convince this Court that you were a very minor participant in this very major drug conspiracy, but I can assure you you've been very unsuccessful and your attorneys have been unsuccessful in that regards, because I simply did not believe that for a minute. I think you were very much involved, very important part of this very major drug conspiracy. I think that the U.S.

Attorney's Office has been very lenient with you in placing in a position where you will be eligible for parole, when none of your Co-Defendants will have that benefit.

Therefore, it's the sentence of the Court that there is a $50 mandatory assessment. That you be incarcerated in the custody of the Attorney General for a period of 15 years under Title 18, United States Code, Section 4205 (a), and that you be fined $30,000.

Anything further, Counsel?

MR. DUNNAM: That's all, Judge.

Judge, did you rule on those - that motion?

THE COURT: The- all parts of it are overruled and denied except the part that Mr. Johnston said he agreed with. And I merely stated on the record that that would have no bearing on the sentence the Court would impose, in any event.

MR. MCDONALD: And that would be - that would be paragraph four, Your Honor?

MR. JOHNSTON: That's paragraph five, Financial Values.

MR. McDonald: Five.

MR. DUNNAM: Judge, there is one other thing that he brought up. He's -- he's been in solitary confinement for a solid year, as attested by the nurse, and the - he had missed the child custody fight over his children. And we'd ask the Court to permit him to report wherever he's ordered, from bail. Permit bail to be granted and he be ordered to report whatever date the Court selects. He'll report in person. He know that that helps on later parole, his appearing voluntarily, and he -

after a year of solitary confinement, it's contrary to this jail's – him being in it over here, he hasn't been even afforded the rights that are granted in the toughest maximun penitentiary in the country this past year. And if the Court can let him report voluntarily and permit him to go on bail.

THE COURT: What type of bail are you suggesting would be possible, Mr. Dunnam?

MR. DUNNAM: Well, his brother, I'm sure, will sign any – any amount of a PR bond and would give a deed of trust – the land they own has they're building on here – to secure his appearance.

THE COURT: Mr. Johnston, your standing?

MR. JOHNSTON: Your Honor, in this case several times we've been called upon to produce evidence why the Defendant shouldn't be out on bond and we've done that. And flight is – is one thing. I don't think it's necessary that – weighs that heavily– but we have always been concerned that this Defendant would threaten or injure witnesses that made this– helped make this case against him, we still feel that way. I think he's been given leniency, we've bent over backwards for the man. We strongly object, based on the facts that are in te record before the Court. We're afraid he's going to hurt somebody or kill a witness if he gets out.

MR. McDONALD: Your Honor, if – if I might just– all the witnesses that the Government used– principally used are already federally incarcerated at this time. We've got an affidavit from one of them before the Court right this very minute.

MR. JOHNSTON: Those aren't the ones we're

concerned about, Your Honor.

THE COURT: Well–

MR. DUNNAM: Judge, the primary witness has presented facts by affidavit.

THE COURT: I'll take this matter under advisement and take it up with Mr. Reyna, the Pre-Trial Services Officer.

Thank you, Counsel.

MR. McDonald: Thank you, Your Honor.

(Hearing closed)

THE STATE OF TEXAS)

CITY OF McLENNAN)

I, Morris W. Bowen, Certified Shorthand Reporter and Official Court Reporter in and for the United States District Court for the Western District of Texas, do hereby certify that the foregoing pages 1 thru 9 constitute and contain an accurate and complete transcription of my shorthand notes taken in the above entitled and numbered cause on the dates reflected therein, and that such transcript was prepared under my direction ad supervision.

I certify that the transcript fees charged and page format used comply with the requirements of this Court and the Judicial Conference of te United States.

TO CERTIFY WHICH, witness my signature hereto in the City of Waco, County of McLennan, State of Texas, on this the 13th day of April A.D. 1989.

"S/ Morris W. Bowen"

Morris W. Bowen, CSR # 107
Official Court Reporter
U. S. District Court
Room 315, P. O. Box 1908
Waco, Texas 76703

APPENDIX - 10

Fort Worth Medical Center
Allan Ray McFarland
P.O. Box 15330
Fort Worth, TX 76119

FILED
JUL 03 2003
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA
PLAINTIFF

V

NO W-88-CR-10

ALLAN RAY MCFARLAND
DEFENDANT

WRIT OF ERROR CORAM NOBIS

I
JURISDICTION

This Court has jurisdiction to hear and adjudicate McFarland's Writ pursuant to 28 U.S.C. 1651, The All Writs Act, and pertinent case law.[1]

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[1] United States v Morgan 346 U.S. 502 (1954)
38 A.L.R. Fed 617 2(a) (1978)

II
STATEMENT OF THE CASE

On February 10, 1988 McFarland was indicted in a five (5) count indictment charging Manufacture of methamphetamine 21 U.S.C. 841 (a) (1), Conspiracy to manufacture Methamphetamine, and to Possess with Intent to Distribute Methamphetamine 21 U.S.C. 846, Carrying a Firearm 18 U.S.C. 924 (c) (2), and use of a Communication Facility to Facilitate Commission of a Felony 21 U.S.C. 843 (b).

On March 8, 1988 a five (5) count Superceding Indictment was issued charging McFarland with the same crimes and counts.

On May 20, 1988 McFarland entered into a Plea Bargain with the Government whereby he agreed to plead guilty to count 2 of the Superceding Indictment charging Conspiracy to manufacture Methamphetamine 21 U.S.C. 846 and to Possess with Intent to Distribute Methamphetamine and count four (4), Use of a Communication Facility to Facilitate the Commission of a Felony 21 U.S.C. 843 (b).

The Factual Basis of the elements were, that from November 1987 to January 22, 1988 that McFarland conspired with persons known and unknown to the grand jury to manufacture methamphetamine, and to possess

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1 Alikhani v United States 200 F3d 732 (11th Cir)
United States v Peter 01-6982 October 28,2002 (11th Cir)
Jones v Watts 142 F2d 575 (5th Cir 1944)

with intent to distribute methamphetamine 21 U.S.C. 841 (a) (1) and 846.

And that on November 9, 1987 that McFarland distributed methamphetamine.

And that on November 11, 1987 McFarland used a communication facility to distribute methamphetamine.

That during the fall of 1987 McFarland made his rent house available to his co-conspirators to manufacture methamphetamine.

That McFarland aided in the production of approximately one pound of methamphetamine.

That McFarland distributed approximately one ounce of methamphetamine on November 9, 1987 at 5500 Franklin, Waco, Texas by using a communication device on November 11, 1987.

However, on October 14, 1988 McFarland withdrew his plea of guilty and the court rejected the Plea Agreement entered into on May 20, 1988.

On December 5, 1988 the united States Attorney issued an Information charging McFarland with Possession of Methamphetamine with Intent to Distribute on July 15, 1987 in violation of 21 U.S.C. 841 (a) (1).

On the same date McFarland signed a Plea Agreement agreeing to plead guilty to the one (1) count information filed on the same date.

The Government's Factual basis was that McFarland on July 15, 1987 possessed methamphetamine with intent to distribute, that what McFarland received, was manufactured by Roy Wells Jr., Patricia Shaw and others in July 1987 at McFarland's house.

McFarland was sentenced on February 6, 1989. Transcript page 4, lines 10 through 20 state that "We stand on the Factual Basis, which this defendant agreed was a true and accurate Factual Basis....

McFarland was sentenced to fifteen (15) years imprisonment under the old parole law.

McFarland was released on parole in January 1993 and released from parole in February 1998.

III
ARGUMENT

McFarland has now completed his sentence, parole, and been released from further restraint from the United States of America, in this case.

A Writ of Error Coram Nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post conviction relief under 28 U.S.C. 2255.

The Supreme Court [2] explained that Coram Nobis relief is available after sentence has been served because the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.

Routine grant of Coram Nobis relief, however, would undermine the finality of criminal convictions, a finality which is achieved in most federal cases, either at the time a conviction is affirmed on appeal, or at the expiration of the period during which an appeal remains available.

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[2]United States v Morgan 346 U.S. 502 (1954)

Therefore, due regard for total finality of criminal convictions counsels special restraints on the review of collateral attacks on convictions entered pursuant to guilty pleas.

At the same time, the law recognizes that there must be a vehicle to correct errors of the most fundamental character, that is, such as rendered the proceedings itself irregular and invalid. [3]

Therefore, the Writ of Coram Nobis acts as an assurance that deserved relief will not be denied as a result of the technical limitations of other post conviction remedies.[4]

The type of claim that has historically been recognized as fundamental, and for which collateral relief had accordingly been available, is the same claim that McFarland raises here, "Jurisdictional Error."[5]

Since Jurisdictional Errors implicate a Court's power to adjudicate the motion before it, such error can never be waived by parties to litigate.

This Circuit has consistently held that a District Court is without jurisdiction to accept a guilty plea to a

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[3] Morgan N-15

[4]Availability under 28 U.S.C. 1651, OF WRIT OF ERROR CORAM NOBIS TO VACATE FEDERAL CONVICTION WHERE SENTENCE HS BEEN SERVED. 38 A.L.R. Fed 617 2(a) (1978)a

[5]United States v Addonzio 442 U.S. 178, 185 (1979) 60 LED 2d 805

non-offense.[6]

(A)

To set the stage for this issue, McFarland would remind this Court that he withdrew his guilty plea, and this Court rejected his original plea agreement on May 5, 1988 because the elements of a crime were absent from the Superceding Indictment, and the Factual Resume.

ONE COUNT INFORMATION

The one count Information which McFarland plead guilty to charges that on July 15, 1987 .... did knowingly, intentionally, and unlawfully possess methamphetamine, a Schedule II controlled substance with intent to distribute same...

The one count information does no more than recite the Statute 21 U.S.C. 841 (a) (1), that is, there are no acts, evidence or identification of acts or evidence that can be construed as the elements of a crime. This Circuit case law is, that the mere recitation of a criminal statute without more does not change a crime.

The elements the Government must prove is that McFarland actually or constructively possessed methamphetamine and prove that McFarland intended to

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[6]United States v Meacham 626 F2d 503, 510 (5th Cir1980)

United States v Harper 901 F2d 471, 472 (5th Cir 1990)

distribute the possessed methamphetamine.[7]

THE FACTUAL BASIS

The Factual Basis that the government sets forth on December 5, 1988 states that the Government would prove ...McFarland received a quantity of methamphetamine which had been manufactured by Roy Wells Jr., Patricia Shaw, and others, in July 1987... McFarland possessed the methamphetamine with specific intent to distribute it.

The drugs identity certainly was not proved beyond a reasonable doubt.[8]There is not even any circumstantial evidence that could be used to identify the drug, nor is there a lab report or a factual basis that there was even any methamphetamine on July 1987, other than the statement "A Quantity...."

Further, ther is no Factual basis for McFarland's ownership, dominion, or control over methamphetamine.

INTENT

Other than the statement that McFarland possessed the methamphetamine with specific intent to distribute it, the Information, Factual Basis, and the Plea Hearing has no proof produced by the Governemnt of

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[7]United States v Osgood 794 F2d 1087, 1094-95 (5th Cir 1986)

[8]United States v Osgood 794 F2d 1087, 1096 (5th Cir 1986)

some degree of criminal intent necessary for the underlying distribution.[9]

Certainly McFarland's mere association with Wells and Shaw is not enough to support an inference of guilt.[10]

Therefore, there was insufficient Factual basis for McFarland to plead guilty, [11] or for this Court to accept the Factual Resume and Plea Agreement.

The problem is, the Government's case, left unanswered the question as to whether it's evidence would encompass a particular element.

This Writ is available to bring before this Court that sentenced McFarland, the judgement errors in matter of fact, which have not been put in issue or passed upon prior to this, and are material to the validity and regularity of the Plea Hearing and Sentencing.

Neither of McFarland's Plea Agreements or factual Resumes are for a conspiracy. Certainly McFarland never pleaded guilty to a conspiracy, and if one existed, there was insufficient evidence or elements of proof of McFarland's participation.

McFarland has raised a genuine claim that the District Court lacked jurisdiction to adjudicate his guilty plea, and this Court has the power as a matter of law to

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[9]United States v Nelson 733 F2d 364, 368 N-8 (5th Cir 1984)

[10]United States v Vergara 687 F2d 57, 60 (5th Cir 1982)

[11]United States v Gobert 139 F3d 436 (5th Cir 1998)

grant this Writ.

CONCLUSION

For these reasons the District Court lacked subject matter jurisdiction to accept McFarland's Plea of Guilty and to sentence him:

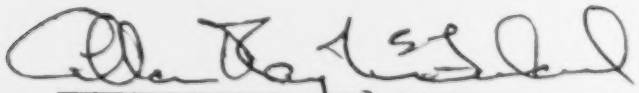
A. There is no Factual basis of the element of possession by McFarland on July 15, 1987 of any amount of methamphetamine.

B. There is no Factual Basis as to the element of Intent.

C. There is no Factual Basis as to the element of Distribute.

Therefore his Plea was without a Factual Basis setting forth the elements of a crime. For this reason McFarland is actually and factually innocent.

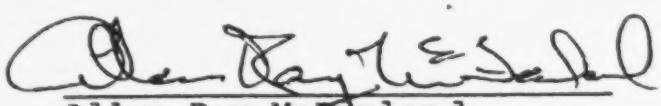
For these reasons, this Writ should issue for McFarland.



Allan Ray McFarland

VERIFICATION

I, Allan Ray McFarland, verify, pursuant to 28 U.S.C. 1746 (2), that the information contained in the attached Writ of Coram Nobis is true and correct to the best of my knowledge.

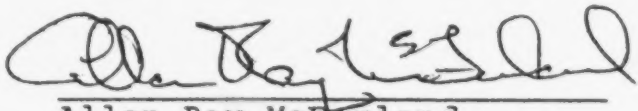


Allan Ray McFarland

CERTIFICATE OF SERVICE

I, Allan Ray McFarland, certify that on the 1st day of July 2003 placed in the inmate mail system, 1st class postage prepaid, a copy of the attached Writ of Error Coram Nobis to:

Assistant United States Attorney



Allan Ray McFarland

APPENDIX -11

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

FILED
DEC 5 1985
CLERK, U. S. DIST. COURT
BY _____ DEPUTY

UNITED STATES OF AMERICA

V

CRIMINAL NO. W-88-CR-10(7)

ALLAN RAY McFARLAND

FACTUAL BASIS

Had this case proceeded to trial, the United States Attorney for the Western District of Texas was prepared to prove and would prove that on or about July 15, 1987, in the Western District of Texas, Defendant, ALLAN RAY MCFARLAND, did knowingly, intentionally, and unlawfully possess methamphetamine, a Schedule II Controlled Substance, with intent to distribute the same, in Violation of Title 21, United States Code, Section 841 (a) (1).

Specifically, the United States Attorney would prove at trial, beyond a reasonable doubt, that Defendant McFarland received a quantity of methamphetamine which had been manufactured by Roy Wells, Jr., Patricia Shaw, and others, in July 1987. The methamphetamine was manufactured on this occasion by Shaw, Wells and others at a house owned by McFarland in Ghoulson, Texas. Defendant McFarland possessed the methamphetamine with the specific intent to distribute it.

Respectfully submitted,

HELEN MILBURN EVERSBERG
United States Attorney

"S/ William W. Johnston "

By: WILLIAM W. JOHNSTON
Assistant United States Attorney

EXHIBIT "B"

EXHIBIT -12

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

FILED
DEC 5 1988
CLERK, U. S. DIST. COURT
BY _____ DEPUTY

UNITED STATES OF AMERICA

PLAINTIFF

CRIMINAL NO. W-88-CR-107

INFORMATION

[Vio: 21 U.S.C. 841(a)(1) Possession of Schedule II Controlled Substance With Intent to Distribute Same]

V

ALLAN RAY McFARLAND

THE UNITED STATES ATTORNEY CHARGES:
That on or about July 15, 1987, in the Western District of Texas, Defendant

ALLAN RAY McFARLAND
did knowingly, intentionally and unlawfully possess methamphetamine, a Schedule II Controlled Substance, with intent to distribute same, in violation of Title 21, United States Code, Section 841 (a) (1).

HELEN MILBURN EVERSBERG
United States Attorney

"s/ William Johnston"

By: WILLIAM W. JOHNSTON
Assistant United States Attorney

APPENDIX -13

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA
PLAINTIFF

V Criminal No W-03-CR-192 (1)

HAROLD WOODFORD TAYLOR, (1)
DEFENDANT

FACTUAL BASIS

On or about August 26, 2003, in the Western District of Texas, Defendant,

HAROLD WOODFORD TAYLOR,

unlawfully, knowingly, and intentionally did manufacture methamphetamine, a Schedule II Controlled Substance, in violation of title 21, United States Code, Section 841 (a) (1) and Title 18, United States Code, Section 2.

Specifically, if this case would proceed to trial, the United States Attorney would prove beyond a reasonable doubt that on August 26, 2003, Sgt. Investigator Bob Turner of the Department of Public safety, Narcotics Service, received information from a reliable confidential informant that Harold Woodford Taylor had meth oil in his freezer at his residence located at 600 East 5th Street, Blum, Texas. Sgt. Turner and members of the Hill County Sheriff's Office went to the residence and talked to Harold Taylor. Mr. Taylor signed a written consent to search. Officers immediately found methamphetamine

oil in the freezer. Officers stopped searching and obtained a state search warrant. Inside the residence during the search, officers found electronic scales, manual scales; packaging material; an air respirator; bones; lithium batteries; and 5 boxes of pseudoephedrine tablets. Patricia Taylor, wife of Harold Taylor, had obtained pseudoephedrine for use in the manufacture of methamphetamine on numerous occasions and knew that the pseudoephedrine in her residence on August 26, 2003, would be utilized to manufacture methamphetamine. The methamphetamine oil seized from the residence was submitted to the Department of Public Safety Laboratory which confirmed that it was methamphetamine oil, and thus, methamphetamine had been recently manufactured.

Respectfully submitted,

JOHNNY SUTTON
United States Attorney

"S/ Steven Snyder "
By: STEVEN L. SNYDER
Assistant United States Attorney
800 Franklin, Suite 280
Waco, TX 76701
(254) 750-1580

The defendant was interviewed for the presentence report in the presence of his attorney, Charles McDonald. On his attorney's advice, he declined to answer questions related to his employment and financial condition.

OFFENSE:

On May 20, 1988, Allan Ray McFarland plead guilty to counts two, four and five, of a superceding indictment, in which he was charged with conspiracy to manufacture methamphetamine and to possess with intent to distribute methamphetamine, distribution of methamphetamine, and using a telephone to facilitate the commission of a felony, to wit distribution of methamphetamine. A plea agreement was filed on that same date. Because the offense alleged had taken place after November 1, 1987, the Sentencing Reform Act of 1984 was applicable. On October 14, 1988, the defendant was notified that the Court would not accept the plea agreement. The defendant was allowed to withdraw his plea of guilty.

On December 5, 1988, the defendant plead guilty to a one count information charging him with possession with intent to distribute methamphetamine. A plea agreement has been filed regarding the information in which in exchange for the defendant's plea of guilty the government has agreed to dismiss the superseding indictment as to this defendant, and to refrain from prosecuting the defendant for any other offenses

committed by him, now known to the government.

Prosecution Version. This investigation, which was conducted by the Department of Public Safety, the Drug Enforcement Administration, and the Waco Police Department, initially began in May 1987 as a result of information received from a confidential informant. The informant advised that he was aware of certain persons who were manufacturing and selling methamphetamine in the McLennan County area.

The agents conducted a series of surveillances with soon developed information regarding an organization which operated numerous clandestine methamphetamine labs which were intertwined with unorthodox religious practices. The organization was referred to as "the temple."

The agent's investigation revealed at least nine persons made up the hierachy of this organization. These persons were observed purchasing chemicals commonly used in the manufacturing of methamphetamine. The also met regularly at facilities, homes and apartments throughout McLennan County, which were owned or leased by various members, for purposes of manufacturing methamphetamine, negotiating drug transactions exchanging money and drugs and holding temple meetings.

Allan Ray McFarland played an important role in this drug conspiracy. Although he never directly

manufactured methamphetamine, he was according to other conspiracy members, a main distributor o methamphetamine for the group, second only to Roy Wells, Jr., in the amount of drugs sold. At least four purchases of methamphetamine from McFarland were completed using Government funds. Although the amount involved were small, it is indicative of McFarland's involvement that he made four separate sales of methamphetamine within a 9-day period. All four of the above-mentioned sales occurred in November 1987, and were made at McFarland's place of business.

McFarland served as a negotiator between the organization and other distributors. He arranged for drugs to be transported to other cities for sale. He allowed a home he owned to be used as one of the Organization's methamphetamine laboratories, and he received a quantity of the drug manufactured there. He stored precursor chemicals for the organization at his business.

McFarland was very involved in the activities of the "Temple". He was trusted by Zell, who allowed him to lead some of the temple meetings. According to several codefendants in this case, at the temple meetings the members discussed their reasons for being involved in the drug business.

The residence at 2800 Savannah Court, where McFarland was living at the time of his arrest, was used by the group to cut and bag methamphetamine, and to separate, count

and split the money from the sale of methamphetamine among the members of the group.

David Zell who is considered the head of the "temple" was responsible for its inception. Pat Shaw was a member of the temple, and then she began dating Glenn McCarty, he became involved with the group. Sometime in 1987 the three decided to get into the business of manufacturing (cooking) Methamphetamine. They needed a recipe and someone to teach them how to cook in order to get started. For this reason McCarty and Allan McFarland introduced Roy Lee Wells, Jr., to Zell. Wells had a reputation as a good methamphetamine cook and he provided the expertise they needed. Seized records reflect and cooperating witnesses support that Zell received a percentage of the profits for himself and additional money for the temple's expenses.

Roy Wells, Jr., was considered to be the chemist for the organization. He reportedly taught others how to cook the illegal substance and in return he received a share of the profits. He was also one of the main distributors for the group. On the night of December 27, 1987, Roy Wells was involved in a shooting in which he was injured. Several weapons identified as belonging to him were found at or near the scene. Wells was also found to be in possession of a quantity of methamphetamine. Chemical analysis of that substance linked it back to the methamphetamine produced by the "temple" group.

Patricia Shaw's association with Zell was the longest as

compared to the other codefendants. She maintained numerous roles in the organization in order to facilitate the manufacturing and sale of the methamphetamine. She often worked as a cook and also as a bookkeeper. She also received a percentage of the profits.

Glen McCarty served numerous functions in this operation. He was observed buying chemicals, was reportedly the bookkeeper for a period of time, and was also one of the cooks. His income was derived from a percentage of the profit.

Raymond Martinez received a lesser amount of the profits than aforementioned individuals. He was considered one of the cooks the operation while also performing other functions as needed.

Randy Wells, Gene Wright, Jr., and Tammy Diane Baker were considered the lower echelon workers in this organization, who performed ma of the manual duties for this group. Their income was generally salary or based on jobs completed, but was much less that what was recei by the other six codefendants.

These illegal activities ended on January 22, 1988, when the authorities executed a search warrant at 510 South McLennan Loop, Elm Nott, Texas where a methamphetamine lab was in operation. Persons arrested included Patricia Shaw, Glen Roland McCarty, Raymond Martinez, Jr., Tammy Diane Baker, Randy Wells, Gene Wright, Jr. Items seized included nine guns, twenty

pounds of finished methamphetamine, forty gallons phenylacetone, precursor chemicals sufficient to produce 75 to pounds of finished methamphetamine, tally sheets, drug customer lists and recipes for manufacturing methamphetamine.

The authorities executed numerous other search warrants on this day at various sites. A search warrant for 2736 Lake Shore Drive, # 11 which is an apartment leased by Tammy Baker, netted a box of ziploc bags containing approximately four and a half pounds of methamphetamine, two weapons, ammunition, scales, and miscellaneous documents. Bal had rented this apartment for the group at the direction of her sister, Patricia Shaw.

A search warrant was executed at 2800 Savannah Court, Waco, Texas at a residence leased by Glen McCarty, however, Allan and Debbie McFarland resided here. Items seized included numerous weapons (including machine guns and ammunition), satanic paraphernalia, two gas masks, a transmitting detection device, a laser sighting device, and miscellaneous documents.

A search warrant was executed at 5500 Franklin, Waco, Texas, a building which houses three businesses owned by Allan McFarland; The Outhouse, Protection Agency, and Protection/Burglar Alarms. Several controlled purchases of methamphetamine were made from McFarland at this address. Items seized included miscellaneous computers, financial and personal records,

videotapes, cassette tapes, telephone records, bank statements, and deposit slips.

As a result of debriefings and information received from cooperating defendants, the investigation teams learned that this organization had operated numerous methamphetamine labs which had since been dismantled, destroyed, or buried. Ryder Rental Trucks were used to transport chemicals and equipment from one location to another. This association operated a sophisticated system of coded ledgers reflecting drug transaction, payment disbursement, production sheets, and other expenses of the operation. It is estimated that the operation netted as much as $20,000 to $30,000 during some weeks. It was also determined that these individuals had contacts in Dallas, Fort Worth, and Houston for the purposes of distribution of illegal drugs.

The Texas Department of Public Safety conducted a laboratory analysis of the drugs seized at the above locations. According to their records, the amount of substance containing Methamphetamine totalled 26.84 kilograms.

Victim Impact Statement. There are no identifiable victims as a result of these illegal activities. However, due to the nature of this criminal activity, there are negative effects and consequences on the community and on those persons who abuse illegal substances.

Defendant's Version. The defendant has submitted a

statement which is attached to this report.